No. 318
Br. of Beckett for Appellees (mo

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JAMES H. MCKENNEY,

Filed Sept. 27, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 318.

THE ILLINOIS CENTRAL RAILROAD COMPANY,
APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, AND THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI ET AL.

MOTIONS TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT OF SAME.

R. C. BECKETT,
Attorney for the Motions.

(17,432.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9-26-'99

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 318.

THE ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT; THE CANTON, ABERDEEN AND NASHVILLE RAILROAD COMPANY, ET AL., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

MOTIONS TO DISMISS OR AFFIRM.

Come all the appellees, except said Canton, Aberdeen and Nashville Railroad Company, and move this honorable court to dismiss this appeal, first, because it is an appeal in an injunction suit, and the purpose and object of said injunction bill have failed; and, second, because this court has no jurisdiction of this appeal; or to affirm the decree, it being man-

ifest that even if this court has jurisdiction, the said appeal was unnecessary and taken for delay only, and, besides, the questions on which jurisdiction depends are so frivolous as not to need further argument.

R. C. BECKETT,
Attorney for said Appellees.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1899.

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*, *vs.* WIRT ADAMS, *State Revenue Agent*; THE CANTON, ABERDEEN AND NASHVILLE RAILROAD COMPANY, ET AL., *Appellees*. } No. 318.

Appeal from the circuit court of the United States for the southern district of Mississippi.

NOTICE.

To Mr. EDWARD MAYES,
Attorney of Record for Appellant in the Above-entitled Case:

You are hereby notified that the appellees, except the said Canton, Aberdeen and Nashville Railroad Company, in the above-named cause will, on Monday, the — day of —, A. D. 1899, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the motion to dismiss or affirm and the brief of the argument thereon hereto attached.

R. C. BECKETT,
Attorney for said Appellees.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1899.

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,
vs.
WIRT ADAMS, *State Revenue Agent*; THE CANTON, ABERDEEN AND NASHVILLE RAILROAD COMPANY, ET AL., *Appellees*. } No. 318.

Appeal from the circuit court of the United States for the southern district of Mississippi.

AFFIDAVIT OF SERVICE.

Before me, L. B. Moseley, clerk of said circuit court of the United States for said southern district of Mississippi, at my office at Jackson, in said district, this day personally appeared the above-named Wirt Adams, one of said appellees, well known to me as such, and, being by me duly sworn, deposes and on oath says that on this day he duly delivered in person to Mr. Edward Mayes, one of the attorneys of record for the above-named appellant, in person, a true copy of the attached motion, notice, and brief of the argument, together with a copy of his affidavit on file.

Sworn to and subscribed before me this day of , 1899.

, *Clerk*.

, *Appellee*.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1899.

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,
vs.
WIRT ADAMS, *State Revenue Agent*; CANTON, ABERDEEN AND NASHVILLE RAILROAD COMPANY, ET AL., *Appellees*. } No. 318.

Statement and Brief on Motions to Dismiss or Affirm.

STATEMENT.

This is an injunction suit by the appellant, The Illinois Central Railroad Company, against the Mississippi Railroad Commission and State railroad assessors and their clerk, and the State revenue agent, and the Canton, Aberdeen and Nashville Railroad Company, in the circuit court of the United States for the southern district of Mississippi, to prevent a completed assessment and a suit for taxes against the property of said Canton, Aberdeen and Nashville Railroad Company for the back taxes of the years 1886–1897, inclusive.

The ground on which the Illinois Central Railroad Company claims the right to bring the bill is that it is the lessee of the property and a creditor and mortgage bondholder of said Canton, Aberdeen and Nashville Railroad Company.

Pars. 7, 8, 16, 19; Record, pp. 7–9, 17, 20.

It was once the owner of all the bonds, amounting to $2,000,000, but for some reason a subsequent mortgage was executed, and under it bonds to the amount of $1,750,000

were issued and sold, and a like amount of the $2,000,000 bond issue were surrendered, and a note secured by a second mortgage taken for the balance. It is not shown how many or really whether the Illinois Central Railroad Company is now the owner of any of the bonds.

Par. 16; Record, p. 17.

It is not shown or claimed anywhere in the bill that the Canton, Aberdeen and Nashville Railroad Company has ever refused to sue, or has ever been in any way requested to sue by the appellant or any one else.

On the contrary, the railroad commission and State revenue agent filed the affidavit of Wirt Adams, the said State revenue agent, to the effect "that the plaintiff, The Illinois Central Railroad Company, owned a majority in number of shares, amount, and value of the capital stock of the Canton, Aberdeen and Nashville Railroad Company at the time said last-named company was organized, and has so owned it ever since, and did at the time the bill was filed in this case and still owns it; and, further, that the majority of the directors of said Canton, Aberdeen and Nashville Railroad Company were directors in said Illinois Central Railroad Company at and before said bill was filed and still are."

Record, p. 33.

The gravamen of the suit is that the said Canton, Aberdeen and Nashville Railroad Company was chartered by the legislature of the State of Mississippi by the act of February 17, 1882, and that by section 8 of its charter it was "exempt from taxation for a term of twenty years from the date of approval of this act," after which the taxes, "whether for

county or State, shall be collected by the treasurer of this State and paid into the State treasury, to be dealt with as the legislature may direct, but said company shall be exempt from taxation by cities and towns," but that the State revenue agent had notified the said railroad commission that said railroad was liable for taxation and delinquent for the years 1886–1897, inclusive, and that said railroad commission had notified appellant and said Canton, Aberdeen and Nashville Railroad Company to appear before it on August 1, 1898, and file a schedule of the property to enable an assessment to be made, and that said railroad commission, "contrary to the rights and protests of your orator, have made such assessment for taxes upon said railroad, and will unless restrained certify the same to said revenue agent, and also to each county and town along the line of said railroad, whose several collectors will seize the property," &c.

Pars. 7, 18, 19; Record, pp. 7, 20, 21.

This is a mistake. Paragraph 18, Record, page 20, attaches a copy of the notice from the railroad commission, and it shows on its face not that they were to file a schedule to enable an assessment to be made simply, but they were notified to appear "and show cause, if any you can, why said railroad should not be assessed," &c., and to enable the railroad commission "to correctly assess said property, if it be liable to taxation, as claimed by said revenue agent."

Record, p. 28.

In paragraph 4, Record, pages 2, 3, the bill cites sections 13 and 20 of article 12 of the constitution of December 1, 1869, the one declaring "the property of all corporations for

pecuniary profits shall be subject to taxation the same as that of individuals," and the other that "taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law," and claims that the supreme court of Mississippi in the case of Mississippi Mills *vs.* Cook, 56 Miss., 40–73, and cases following it, had decided that these provisions of the constitution did not prohibit the legislature from granting exemptions from taxation, but simply from granting irrepealable exemptions—that is, that the words "shall be subject to" did not mean "subjected to," "but that such property shall ever be subject to—*i. e.*, liable to be taxed if the legislature so wills"—and that the charter of the Canton, Aberdeen and Nashville Railroad Company had been accepted and money invested in its building under this construction, but that on June 20, 1898, the said revenue agent, in the case of Wirt Adams, revenue agent, *vs.* Y. & M. V. R. R. Co. *et al.*, had secured an opinion from a majority of the supreme court overruling said former decisions and holding that the words "shall be subject to" in said constitution of 1869 "mean shall be subjected to taxation by each succeeding legislature, leaving no sort of discretion to any legislature in the matter, and those granted by the legislature, whether in charters or otherwise, since 1869 are therefore void *ab initio*."

Pars. 4, 16, and 17; Record, pp. 2, 17–20.

In paragraphs 4, 10, 13, 21, &c., it is expressly admitted that the exemption was repealable; in fact, it is expressly stated that it was "an exemption, however, which both parties to said contract fully understood might be repealed by any

subsequent session of the legislature of said State; but no session of the legislature has seen fit to repeal said exemption."

Par. **26**; Record, pp. 5, 6, 10, 13, 22, **25.**

And it is expressly stated that while the revenue agent act in the Code of 1892 and the act of February 7, 1894, providing that "the revenue agent shall have power to sue for, collect and have assessed, as herein required, delinquent taxes, or taxes that have escaped the assessor and collector back to and including the year 1886," are subsequent laws, yet "that neither of these subsequent statutes affect or impair, nor were they intended by the legislature to impair or affect the exemptions aforesaid as granted in the charter of the Canton, Aberdeen & Nashville Railroad Company, nor any of the many charter exemptions granted by said State at every session of its legislature, theretofore."

Par. 15; Record, pp. 16, 17.

It is claimed that the provision in the charter, *supra*, that after the expiration of the exemption the taxes "shall be collected by the treasurer of this State" is a valid and binding contract, and that said assessment and the attempt of the revenue agent to collect the taxes is a cloud on the title and violates section 10, article 1, and the fourteenth amendment to the Constitution of the United States.

Pars. 7, 11, 12, 19, 20–26; Record, pp. 7, 10–12, 20, 21–26.

It will be noticed that the charter says nothing about the State treasurer collecting any *town* taxes, and the State and

county taxes are only to be so collected after the twenty-year exemption expires.

Par. 7: Record, p. 8.

The prayer of the bill is to enjoin "the defendants, The State Railroad Assessors aforesaid, from approving and the said assessors and the clerk aforesaid from certifying the said assessment for taxes on the Canton, Aberdeen and Nashville railroad for any of the years 1886 to 1897, both inclusive, to the several counties through which said road is located, or any of them, or to any of the cities or towns along said line of railroad," and to enjoin said Wirt Adams, revenue agent as aforesaid, "from beginning, by himself, his attorneys, solicitors or agents, or advising or inciting any of the counties or towns to begin any suit against your orator for the recovery of any judgment or decree for such taxes or for the enforcement of the alleged lien for taxes for any of said years mentioned in this bill, and from taking any proceedings looking to the subjection of the property of your orator or of the railroad known as the Canton, Aberdeen & Nashville railroad to the payment of the taxes so claimed," and that on the final hearing said injunction may be made perpetual, "and that the property of your orator and the said Canton, Aberdeen & Nashville railroad may be adjudged and decreed to be exempt from State and county taxation for the years aforesaid, and that the contract of exemption, as shown by its charter, be declared to be valid and binding both as to the State and counties therein for the term of twenty years from the time of said charter, unless sooner repealed by the legislature of said State; and, also, that it be adjudged to be, under said charter contract,

perpetually exempt from taxation by cities and towns, unless and until the legislature of said State shall repeal said exemption, and that the assessment, made as aforesaid by the said railroad commission, be decreed to be null and void, and the cloud upon the title of your orator aforesaid be removed;" and also to "decree that the provision in its charter as to who shall collect the taxes, whenever in the future they shall be collectible, is a valid and binding contract."

Record, pp. 26, 27.

The sheriffs and tax collectors of the counties and towns were not made parties, and no relief is asked against them. A temporary injunction or restraining order was made and writ issued and served.

The complainant made a motion for a temporary injunction, and said defendants moved to discharge the restraining order and quash the restraining writ, and objected to the granting or issuance of any injunction because:

"1st. They have no authority to distrain or levy on or sell anything for said taxes, and were and are merely performing their duties under the laws of Mississippi, and an injunction against them or any of them, is a suit against the State of Mississippi, and prohibited by the 11th amendment to the Constitution of the United States.

"2d. Said railroad commission in making said assessments act judicially, and cannot be enjoined, and said revenue agent cannot act until after said assessments are made, approved, and sent to the various counties as required by the laws of Mississippi.

"3d. The court has no jurisdiction.

"4th. Said injunction was prematurely applied for.

"5th. Plaintiff has shown no right to file the bill in this case, under the 94th equity rule, or otherwise.

"6th. The plaintiff is not entitled to any injunction on the facts shown in the bill.

"7th. There is no equity on the face of the bill."

Record, pp. 31, 32.

Both motions were heard at the same time, and the court "finds that the complainant has shown no right to invoke the jurisdiction of this court, and further being of opinion that this court has no jurisdiction, it is therefore considered, and so ordered, adjudged, and decreed, that the motion to discharge said restraining order is sustained, and said restraining order is hereby discharged, and it is further ordered that said motion to grant an injunction is overruled and injunction refused."

Record, pp. 38, 39.

From this interlocutory order an appeal was prayed and granted to the United States circuit court of appeals for the fifth circuit, at New Orleans, which dismissed the appeal, and on May 1, 1899, the said circuit court of the United States for the southern district of Mississippi, on motion of said defendants, dismissed the bill, and from this last decree this appeal is taken.

Record, pp. 40, 43.

The ground of the motion to dismiss the bill was that it was an injunction bill; that the injunction had been refused, and from the decree refusing the injunction an appeal had been taken to said United States circuit court of appeals, which had dismissed the appeal for want of jurisdiction, as shown by a copy of the opinion of said court.

Record, p. 43.

The petition for appeal to this court states that it is asked, under section 5 of the act of March 3, 1891, on the ground of want of jurisdiction.

Record, p. 44.

The judge certifies to the substantial statements of the bill, which is itself before this court, and that one of the grounds of the motion of defendants to discharge the restraining order was that "the court had no jurisdiction to issue the same or to entertain the cause," and that the court made a decree discharging the restraining order and refusing an injunction on February 8, 1899, and on May 1, 1899, dismissed the bill on motion of the defendants, Wirt Adams, State revenue agent, and the said Railroad Commission, and their said clerk, and then certifies to this court, "in conformity with the 5th section of the act of Congress of the year 1891," that the jurisdiction of the court was in issue upon the following three grounds:

Record, pp. 47–49.

"1st. That the complainant in its original bill showed no jurisdiction on the ground of diversity of citizenship. Defendants claim that complainant's interest was derivative through the Canton, Aberdeen & Nashville Railroad Company, and that the complainant had no right to raise jurisdiction in the Federal court by making said Canton, Aberdeen & Nashville Railroad Company a defendant in the case.

"2d. That the complainant by its original bill showed no jurisdiction in this court because of the subject-matter stated, inasmuch as the bill set forth no proper Federal question.

"3d. That there was no jurisdiction in this matter, because the bill was a suit against the State of Mississippi, and in

violation of the eleventh amendment of the Constitution of the United States."

Record, p. 49.

"The appeal is granted solely upon the question of jurisdiction, this court having refused to assume jurisdiction of this cause."

Record, p. 45.

And the assignment of errors is that "the court erred in dismissing the bill filed by the complainant herein for want of jurisdiction to entertain the same."

Record, p. 44.

The appellee, Wirt Adams, State revenue agent, has made and filed an affidavit, which has been printed and filed and is now referred to as a bar to the further prosecution of this appeal, in which he shows that after the injunction was refused, and before the bill was finally dismissed or an appeal taken to this court, he filed a bill in equity in the chancery court of Clay county, Mississippi, against the said Illinois Central and Canton, Aberdeen and Nashville Railroad Companies to collect the same taxes involved here on the same property, and the taxes of 1898 in addition; that the said defendants in their answer set up the same defenses relied on here, which were overruled by the chancery court and final judgment given against the property as a paramount lien on June 16, 1899, from which decree an appeal is now pending and undetermined in the State supreme court.

POINTS INVOLVED.

There are four main points involved:

1st. Whether this court will sustain an appeal which the record and affidavit of the appellee, The State Revenue Agent, show to be entirely unnecessary.

2d. Whether this court has jurisdiction under the first class or jurisdiction-alone clause of the fifth section of the judiciary act of March 3, 1891, under which this appeal is taken.

3d. Whether any Federal question is necessarily involved; and, if so, whether it was not correctly decided by the court below.

4th. Whether it is a suit against the State of Mississippi.

BRIEF.

As we are not familiar enough with the rules of this court to know whether it is entirely proper to refer to briefs in other cases or to make the brief in each case complete within itself, we have made use of a considerable amount of repetition; but if the court desires more light on any one point, they will find that our briefs in each of the cases Nos. 318, 319, and 320 are to some extent different and made to reinforce each other. There are some points of difference and also some points substantially similar in each case.

FIRST POINT.

The affidavit of the State revenue agent shows that after the restraining order was discharged and injunction refused and an appeal to the circuit court of appeals for the fifth circuit dismissed, and before the bill was finally dismissed or this appeal taken, the said revenue agent had instituted a suit in equity in the State chancery court of Clay county, Mississippi, for the collection of the taxes here involved, including in addition the taxes for the year 1898, against both the Illinois Central and Canton, Aberdeen and Nashville Railroad Companies, where the said defendants, after demurrer overruled, filed their answer setting up the pendency of this suit, and also all the defenses attempted to be set up in this case; that said case was set down and tried on bill and answer, when all said defenses were overruled and a final decree rendered in favor of the complainant, from

which decree an appeal was taken and is now pending in the State supreme court.

We freely admit that as a general rule the court which first acquires jurisdiction of a cause is entitled to proceed with it to a final determination; but this rule is subject to certain exceptions, which we have argued in our brief in the case No. 320, now pending here, on a similar motion.

But the point here is that when a pure injunction bill is filed to prevent the State assessing board from completing an assessment and the State revenue agent from bringing suit, and the injunction is refused, and the assessment completed and suit brought on it, and an appeal is taken to this court *without supersedeas*, that the appeal is abortive and improper, for the reason that the very things which the bill was filed to prevent are accomplished facts, and the defendants cannot be injured, because they have an ample and full remedy by writ of error to the supreme court of Mississippi from this court if any Federal question is involved and decided against them by the Mississippi supreme court. Of course, this rule would not apply if the Illinois Central railroad had any right to bring the suit in this case as the sole plaintiff, and that they did not we endeavor to demonstrate hereafter under the next head.

An injunction is a summary and extraordinary process, which rests somewhat on discretion, and should never be granted or continued where there is a plain, adequate remedy at law, and most certainly not where the purpose and object of it have already failed. What would a reversal accomplish? This court cannot force the State revenue agent to discontinue a suit which he has rightfully brought while there was no injunction against him.

But, further than this, a decree has already been rendered in his favor in the chancery court of the State, from which an appeal is now pending in the State supreme court, which can come to this court on writ of error in a proper case, and that decree while unreversed is a bar to the further prosecution of this appeal, although this suit was commenced first.

Oakes *vs.* Mase, 165 U. S., 363, 364.

Stout *vs.* Lye, 103 U. S., 66.

Same case, U. S. Sup. Ct., Lawyers' Co. of Ed., 428, 429.

United States *vs.* Dewey, 25 Fed. Cases, 848, citing—

B'k of U. S. *vs.* Merchants' Bank, 7 Gill (Md.), 415.

Bank of N. A. *vs.* Wheeler, 28 Conn., 433.

McGilvray *vs.* Avery, 30 Vt., 538.

Rogers *vs.* Odell, 39 N. H., 452; and

1 Chitty, Pldg., 454.

See also—

Paine *vs.* Schenectady, 11 R. I., 411.

Memphis, &c., R. R. Co. *vs.* Grayson, 88 Ala., 572.

1st ed. 12 Am. & Eng. Ency. Law, 149 (*c*), par. 8, n. 3 and 4.

Union Pac. R. R. Co. *vs.* Baker, 5 Kans. App., 253.

Nugent *vs.* Philadelphia, &c., 87 Fed. R., 251.

United States *vs.* Dewey, *supra*, 6 Biss., 501.

And the differences between a judgment or decree and between a writ of error or appeal and between the effect of a final decree or judgment are all abolished in Annotated Code of Mississippi of 1892. Section 31 abolishes between the form and provides that everything must be taken by appeal. Section 594 provides that the decree "shall have the same force, operation and effect of a judgment at law in the circuit court," and section 32 provides that in cases from final decree or judgment the party may have supersedeas, but that "in no case shall such appeal be held to vacate the judgment or decree."

SECOND POINT.

From the foregoing statement it is evident that one of the grounds on which the bill was dismissed was, in its essence, non-Federal. The judgment of the circuit court refusing the injunction was expressly based on two findings:

1st. That "the plaintiff had shown no right to invoke the jurisdiction of this court."

2d. That "this court has no jurisdiction."

Now, when a motion to dismiss the bill was afterwards made, and no leave was asked to amend the bill, and the ground of the motion was because the injunction had been refused, and the motion was sustained and bill dismissed without more, it necessarily follows that the dismissal was on the same grounds on which the injunction was refused.

The first finding in the decree refusing the injunction was clearly in response to the evidence under the fifth ground of the motion, that "plaintiff has shown no right to file the bill in this case under the ninety-fourth equity rule or otherwise."

This in turn was based chiefly on the undisputed affidavit of Wirt Adams, that the plaintiff, The Illinois Central Railroad Company, had a majority of the directors and owned a majority of the shares in the capital stock of the defendant, The Canton, Aberdeen and Nashville Railroad Company, showing that there was no cause nor necessity for making The Canton, Aberdeen and Nashville Railroad Company a defendant, and thus seeking to commit a fraud on the jurisdiction and gain access to the Federal court as a non-resident.

The motion to discharge the restraining order and refuse the injunction was that the plaintiff had shown no right to file the bill under the ninety-fourth equity rule *or otherwise*. The ninety-fourth equity rule makes very stringent regulations to prevent parties with only derivative rights from getting into the Federal court on a claim of non-residence; but the motion was not confined to this rule. It said under the ninety-fourth equity rule *or otherwise*, and it is clear that in this case it was not necessary to go so far as to stand alone on the rule, for the attempt in this case violates the general equity rule, that a stockholder cannot sue to protect the charter or corporate rights until he has requested the corporation to sue and they have refused, and that could not be shown in this case, because the undisputed affidavit of Wirt Adams shows that the plaintiff, The Illinois Central Railroad Company, owned a majority of the shares of capital stock and had a majority of the directors of the defendant, The Canton, Aberdeen and Nashville Railroad Company.

Hawes *vs.* Oakland, 104 U. S., 450.
Taylor *vs.* Holmes, 127 U. S., 489.
Mount *vs.* Radford, 93 Va., 430, 431.
Ware *vs.* Bazeman, 58 Ga., 340.
Warren *vs.* Shoe Co., 166 Mass., 97.
Decatur *vs.* Palm, 113 Ala., 531.

And generally see—

4 Thompson Comm. Law Corp., § 4476–4480.

They sue also as a creditor. They cannot do that until they have reduced their claims to judgment.

Van Weel *vs.* Winston, 115 U. S., 245, 246.
Cates *vs.* Allen, 149 U. S., 451.
May's U. S. Sup. Ct. Prac., p. 552.

They also attempt to sue as a bondholder, but their bill shows that there were at first $2,000,000 of bonds, and that for certain financial reasons another mortgage was executed and bonds issued under it to the amount of $1,750,000, which were sold, and the amount of the prior $2,000,000 issue paid off, and that for the balance of $250,000 a note was taken, but the bill does not show what part of said $1,750,000 the Illinois Central railroad owned or that it really owned any of them at the time of filing the bill, and they do not make the trustee of the mortgage a party, or even tell who or what he or it is, or whether it or he is a non-resident. The rule about this, as stated, is that the relation is analogous to that of a stockholder to the corporation, and that a bondholder is not authorized to institute or prosecute suits for the safety or security of the trust estate until he has requested the trustee to sue.

Coal Co. *vs.* Blatchford, 11 Wall., 172, 177.
Stevens *vs.* Eldridge, 4 Cliff., 348.
Morgan *vs.* Kans. Pac. R. R. Co., 15 Fed. R., 56, 57.
Owens *vs.* Ohio, &c., R. R. Co., 20 Fed. R., 12, 13.
Barry *vs.* Mo., Kans. & Tex. R. R. Co., 27 Fed. R., 1, 2.
Ritchter *vs.* Jerome, 123 U. S., 246–248.
(4th ed.) 2 Perry on Trusts, § 885, 886, citing—
Reade *vs.* Sparkes, 1 Moll., 8.
Hughes *vs.* Key, 20 Beav., 395.

See also—

City of Atlanta *vs.* Grant, 57 Ga., 340.
5 Thompson Comm. Law Corp., § 6126, 6209, 6210.
Van Weel *vs.* Winston, 115 U. S., 245.

Equity will not grant relief to one who seeks relief independently and derivatively through the rights of others, who are themselves not asking relief or who are not made coparties.

(3d ed.) 2 High on Inj., § 1547, citing—

Roberts *vs.* Bozon, 3 L. J. Ch., 113.

Bagg *vs.* Detroit, 5 Mich., 336.

If the trustee refuses on request to sue, then the suit may be brought by one or more, but it must be brought *on behalf of all*, for equity will not undertake to settle such matters by piecemeal, and the object and ground of equity jurisdiction is to prevent a multiplicity of suits, which could not be done if each were permitted to sue separately.

Wood *vs.* Draper, 24 Barb., 187.

Williams *vs.* County Court, 26 W. Va., 488.

Packard *vs.* B'd County Com., 2 Colo., 338.

(3d ed.) 2 High on Inj., § 1560.

And in all cases the trustee or corporation representing the interests of all and to bind all is an indispensable party.

Winslow *vs.* Minn., &c., R. R. Co., 4 Minn., 316.

Barry *vs.* Mo., Kans. & Tex. R. R. Co., 27 Fed. R., 1, 2.

Morgan *vs.* Kans. Pac. R. R., 15 Fed. R., 56, 57.

2 Pomeroy Rem. & Rem. Rights, §§ 356, 357.

5 Thompson Comm. Law Corp., § 6210 & n. 4 & 5.

Carey *vs.* Brown, 92 U. S., 171, 172.

McArthur *vs.* Scott, 113 U. S., 340.

Ritchter *vs.* Jerome, 123 U. S., 246.

Bealls *vs.* Ills., Mo. & Tex. R. R. Co., 133 U. S., 290.

May's U. S. Sup. Ct. Prac., p. 552.

The same rule applies as between lessee and lessor.

Bellaire *vs.* Balt., &c., 146 U. S., 117, 119.

Chicago *vs.* Crane, 113 U. S., 432–435.

Swann *vs.* Frank, 148 U. S., 610, 611.

Horton *vs.* Wallace, 23 C. C. A., 71.

Same case, 66 Fed. R., 409, and 77 Fed. R., 61.

The Illinois Central Railroad Company had a majority of the directors and a majority of the stock of the Canton, Aberdeen and Nashville Railroad Company, and they could not place themselves on opposite sides of the docket, for they are one and the same thing.

South Springs *vs.* Amador, 145 U. S., 301.

May's U. S. Sup. Ct. Prac., p. 45.

Merritt *vs.* Bowdoin College, 169 U. S., 556.

This was shown by the affidavit of Wirt Adams, which was not objected to, and, if it had been, was competent evidence, as has been abundantly settled.

(3d ed.) 2 High on Inj., §§ 1577, 1578.

Indeed, it seems to be a universal rule that where a party acts collusively or attempts to commit a fraud on the jurisdiction, it may be shown either by the record or *by extrinsic evidence*, or even by an *amicus curiæ*.

Kimball *vs.* Kimball, 174 U. S., 160–162.

Lake Co. *vs.* Dudley, 173 U. S., 251–254.

For a general collection of cases, see—

2nd Ency. Pldg. & Prac., pp. 341–344, and n. 1, 2, and 3, p. 344.

The State of Mississippi has no independent contract with the Illinois Central Railroad Company. Every right in which it claims as creditor, bondholder, or lessee comes entirely and exclusively through the charter of the Canton, Aberdeen and Nashville Railroad Company, and it can claim no higher or greater rights than are contained in that charter or than could be claimed by the Canton, Aberdeen and Nashville Railroad Company itself. The State has a right to collect its taxes, and if the incidental effect is to impair a lease or bonds or any other contract to which it was not a party, that is no defense.

In re Ayers, 123 U. S., 496.
Ritchter *vs.* Jerome, 123 U. S., 248.
Morley *vs.* Lake Shore, &c., 146 U. S., 162.
Schurz *vs.* Cook, 148 U. S., 397.
Peterson *vs.* Kittridge, 65 Miss., 39.
Roberts *vs.* Bozon, 3 L. J. Ch., 113.
Bagg *vs.* Detroit, 5 Mich., 336.
(3rd ed.) 2 High on Inj., § 1547.

Indeed, Mr. Justice White goes to the heart of the thing when he says there can be no irrepealable contract right when there is no irrepealable contract.

Louisville *vs.* Bank of Louisville, 174 U. S., 444.

Hence, we say, in the language of the fifth ground of the motion to discharge the restraining order and refuse the injunction, that "the plaintiff has shown no right to file the bill in this case under the ninety-fourth equity rule or otherwise," and in the language of the first finding in the order

refusing the injunction, "that the complainant has shown no right to invoke the jurisdiction of the court."

So the first ground of the order and the first certified ground is plainly a decision based on general principles of law, and we ask a dismissal of the appeal, because this court has decided that to sustain such an appeal the question of the jurisdiction must be to the jurisdiction of the circuit court as a Federal court, and not on grounds equally applicable to all courts of equity.

Blythe *vs.* Hinckly, 173 U. S., 501.
Third Street, &c., *vs.* Lewis, 173 U. S., 457, 460.
No. 256, Blythe Co. *vs.* Blythe, 172 U. S., 644.
Smith *vs.* McKay, 161 U. S., 357, 358.

And the decision as to the jurisdiction of the court *as a Federal court* must be the *controlling part* of the decision.

Carey *vs.* Houston, 150 U. S., 170, 181.

And not only was the decision that the plaintiff had shown no right to invoke the jurisdiction of the court not based on the jurisdiction of the court as a Federal court as the *controlling* factor, but that was really not necessarily embraced in the decision at all.

This court has held, on the contrary, that a decision as to who is the proper party to bring a suit does not even raise a Federal question, although a Federal question may be involved in the merits if brought by the right party.

Montgomery *vs.* Hernandez, 12 Wheat., 129.
Merritt *vs.* Bowdoin College, 169 U. S., 551, 556.

And as the parties have deliberately brought the suit in the manner they did, and to commit a fraud on the jurisdiction, it should have been dismissed; but it is immaterial here whether the decision of the circuit court was right or wrong. It did decide that the plaintiff had shown no right to invoke the jurisdiction of the court under the ninety-fourth equity rule *or otherwise*, and the certificate of the judge shows that the exact point was that the Illinois Central Railroad Company had no right to raise jurisdiction in the Federal court by making The Canton, Aberdeen and Nashville Railroad Company a defendant. While in this particular instance it prevented the plaintiff from suing in the Federal court, it was not because it was a Federal court, but on a principle applicable alike to all courts, and hence this court has no jurisdiction under that clause of section 5 of the judiciary act of March 3, 1891, under which the appeal was taken and cause certified, and it should be dismissed.

And to show that the Illinois Central Railroad Company and Canton, Aberdeen and Nashville Railroad Company have never considered themselves as on opposite sides of the docket, the attorney for the Illinois Central Railroad Company also waives all notices, &c., and even the citation to this court, as the attorney for the other company.

Record, pp. 42, 46.

And further, to show they had no confidence in the jurisdiction by reason alone of non-residence of the Illinois Central Railroad Company, as sole plaintiff, in the jurisdiction-alone paragraph of the bill they simply aver that the

"taxes amount to a large sum, much more than $20,000, to wit, the sum of — dollars."

Par. 19; Record, pp. 20, 21.

Which does not show that the jurisdictional amount of $2,000 would be due to the State or any of the counties or towns, and the bill would have been properly dismissed for this reason alone.

Citizens' Bank *vs.* Cannon, 164 U. S., 321, 322.
Fishback *vs.* W. U. Tel. Co., 161 U. S., 99–101.

And further still, as we understood it, one of the main grounds on which the circuit court decided that the plaintiff had shown no right to invoke the jurisdiction of the court was that this same Illinois Central Railroad Company and the Yazoo and Mississippi Valley Railroad Company had voluntarily filed a bill in the State court to enjoin a similar assessment, and that the Illinois Central Railroad Company was bound by that decision and could come into the Federal court to relitigate the same question.

R. R. Co. *vs.* Adams, 73 Miss., 662, 663.
Forsyth *vs.* Hammond, 166 U. S., 517, 518.
Rosenthal *vs.* Coates, 148 U. S., 147, 148.
French *vs.* Hay, 22 Wall., 238.

THIRD POINT.

The Question of Jurisdiction as a Federal Court.

This is raised by the second certified ground, which was in substance as follows:

(A.)

That the Bill Set Forth No Proper Federal Question.

If this court can tolerate the kind of collusion attempted to be practiced here, and place both the Illinois Central and the Canton, Aberdeen and Nashville Railroad Company on the same side of the docket as plaintiffs, where they have not placed themselves nor asked this court to place them, then the jurisdiction would depend on whether the circuit court had any jurisdiction as a Federal court. We protest against this, and that the court should leave the parties where they have deliberately placed themselves; but if the court should differ with us on this point, then we present the following argument on the other points:

(A 1).

That the Bill Raises No Proper Federal Question.

This court has decided that two things must co-exist to give this court jurisdiction: First, that there must be a Federal question involved in the case; and, second, that it must be raised at the proper time and in the appropriate way.

The plaintiff has raised some sort of a question at the proper time and in the appropriate way, if it can be raised at that time and in that way; but the point which overshadows all others is, is it a Federal question?

A Federal question cannot be created or manufactured to order, but must exist. We do not mean that it ought to be decided one way or the other, for then it would cease to be a Federal question or any other kind of a question. It must be such a question as could be held to raise a fair and reasonable ground of contention between fair and reasonable men, a question in and about which there can be said to exist a fair and reasonable dispute, or, as the court generally puts it, a question about which there is *bona fide* color for dispute or difference of opinion, where there is no real diversity of citizenship.

McCain *vs.* Des Moines, 174 U. S., 169, 170, 181.
St. Joseph *vs.* Steele, 167 U. S., 662.
Clark *vs.* McDade, 165 U. S., 172.
Wilson *vs.* North Carolina, 169 U. S., 595.
Hamblin *vs.* Western, &c., 147 U. S., 531.
N. O. *vs.* N. O. Water Works Co., 142 U. S., 79, 87.
Millingar *vs.* Hartupee, 6 Wall., 258.

It is evident that the parties themselves did not believe there was any *bona fide* claim of a Federal question involved in the case, for they sought to get into the Federal court on the collusive claim of non-residence.

The exemption is expressly admitted all through the bill to be repealable and never repealed, and the gist of it all is that after making certain decisions and establishing a *stare*

decisis the Supreme Court has overruled its former decisions and held the exemption granted in 1882 to be unconstitutional under an antecedent constitution of December 1, 1869—a case of *stare decisis* pure and simple. This court has so often and so uniformly decided that this presents no Federal question, that this suit should not be retained for further argument. The true theory of the bill is not a Federal question, but non-residence and *stare decisis*.

Central Land Co. *vs.* Laidley, 159 U. S., 109–112.
Hansford *vs.* Davis, 163 U. S., 278, 279.
Turner *vs.* Wilkes County, 173 U. S., 461.
Winona *vs.* Minn., 159 U. S., 528, 529.
Wood *vs.* Brady, 150 U. S., 20–23.
Huntington *vs.* Attrill, 146 U. S., 684.
N. O. *vs.* N. O. Wat. W'ks., 142 U. S., 87, 88.
Brown *vs.* Smart, 145 U. S., 454, 458.
St. Paul *vs.* Todd, 142 U. S., 286, 287.
N. O. Wat. W'ks *vs.* La. Sug. Co., 125 U. S., 18, 30.
Lehigh *vs.* Easton, 121 U. S., 388, 392.
N. J. C. R. R. Co. *vs.* Mills, 113 U. S., 256, 257.
Boyd *vs.* Ala., 94 U. S., 645.
R. R. Tax Cases, 92 U. S., 575.
R. R. Co. *vs.* Brick, 4 Wall., 177.

We have cited this large number of cases, not because it is necessary to show this court what the law is, but to show the court that this case comes directly under the rule laid down by it, that where there is color for the motion, and the

contention of appellant has often been determined adversely, the motion to affirm should be granted.

Sire *vs.* Ellithorpe, 137 U. S., 579.
St. Louis *vs.* Montana, 171 U. S., 650.
The S. C. Tryon, 105 U. S., 267.
Hinkley *vs.* Morton, 103 U. S., 764.

(A 2.)

The revenue agent act of February 7, 1894, and code provisions under which it is claimed, in paragraph 15 of the bill, that the proceedings are being conducted by the revenue agent, are as follows:

"*Act of February 7th*, 1894, *Laws of* 1894, *pp.* 29–31.

"CHAPTER 34.

"AN ACT to provide for the election of a State revenue agent, to prescribe his powers and duties, and to repeal sections 4187, 4190, 4191, 4192, 4193, and 4195, in chapter 126 of the Annotated Code of Mississippi.

"SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That there shall be elected a State revenue agent, who shall be elected at the general election in 1895 in the same manner that other State officers are elected, and whose term of office shall be four years, and until his successor is elected and qualified. The present incumbent shall hold office for the term of his appointment, and until his successor is elected and qualified.

"SEC. 2. The State revenue agent may appoint a sufficient number of deputies. He shall have power, and it shall be his duty to proceed by suit in the proper court against all officers, county contractors, persons, corporations, companies

and associations of persons for all past-due and unpaid taxes of any kind whatever, for all penalties or forfeitures, for all past-due obligations and indebtedness of any character whatever owing to the State or any county, municipality or levee board, and for damages growing out of the violation of any contract with the State or any county, municipality or levee board. He shall have a right of action and may sue at law or in equity in all cases where the State or any county, municipality or levee board has the right of action or may sue. It is the duty of the State revenue agent to investigate the books, accounts and vouchers of all fiscal officers of the State, and of every county, municipality and levee board, and to sue for, collect and pay over all money improperly withheld from either, and he has the power to sue and right of action against all such officers and their sureties to collect any such moneys; but if the delinquency appear by a correct open account on the books of the proper accounting officer, the right of the revenue agent to sue shall arise only after he has given thirty days' notice to the delinquent officer to pay over the amounts and he has failed to do so.

"SEC. 3. After the expiration of the fiscal year in which taxes become due, should the revenue agent discover that any person, corporation, property, business, occupation or calling has escaped taxation by reason of not being assessed, it shall be his duty to give notice to the tax collector in writing, and the collector shall within ten days thereafter make the proper assessment by way of an additional assessment on the tax-rolls or tax-list in his hands, and give ten days' notice in writing to the person or corporation whose property is assessed, and all objections to such assessment shall be heard at the next meeting of the board of supervisors of counties or board and mayor of aldermen of municipalities. The board of supervisors or mayor and aldermen shall also be notified in writing by the collector of such assessment and the State revenue agent may appear at said meeting, and an appeal to the circuit court may be taken

from the order of the board approving or disapproving such assessment, by either party. If the assessment should be approved and no appeal be taken, and the taxes not paid within thirty days thereafter, the property if it be real estate, shall be ordered sold as provided by section 3850 of the Annotated Code of Mississippi, and if it be personalty the tax collector shall proceed to collect by distress or otherwise. If the tax collector shall fail or refuse to make the assessment and report the same as herein required, he shall be liable on his bond for the amount of taxes properly collectible and ten per cent. damages thereon. If the assessment-rolls be in the hands of the assessor at the time the revenue agent makes discovery of property which has escaped taxation, he shall give the required notice to the assessor, who shall make the proper assessment, and give the required notices to the owner of the property, and to the board of supervisors or mayor and aldermen, under like penalties for failure as provided against the collector, and like proceedings shall be had. When any taxes shall be collected under assessments as herein required, the revenue agent shall receive therefor, at the time of collection, the same compensation allowed him by law for other collections.

"SEC. 4. If the property which the revenue agent discovers to have escaped taxation shall belong to any railroad or other corporation, which, under the law, is required to be assessed by the State railroad assessors, the revenue agent shall give the notice required herein to said State railroad assessors, and they shall give the required notice to the company or corporation. At their next meeting after giving the proper notice, the said property shall be assessed in the same manner required by law, and placed on the proper county, municipal or levee board roll, and collected by the proper officers required by law, and the revenue agent shall have his compensation as in other cases.

"SEC. 5. The revenue agent in the discharge of his official duties shall have full power and authority to examine and

investigate the books, records, papers, accounts and vouchers of any State, county, municipal or other officer.

"SEC. 6. The revenue agent shall have power to sue for, collect, and have assessed as herein required, delinquent taxes, or taxes that have escaped the assessor and collector back to and including the year 1886, and no further.

"SEC. 7. That sections 4187, 4190, 4191, 4192, 4193 and 4195 in chapter 126 of the Annotated Code of Mississippi, be and the same are hereby repealed.

"SEC. 8. That this act shall take effect and be in force from and after its passage.

"Approved February 7, 1894."

The only three sections material to this controversy left unrepealed in said chapter 126 of the Annotated Code of Mississippi of 1892 are as follows:

"4194. Suits by.—All suits by the State revenue agent shall be in his own name for the use of the State, county, municipality, or levee board interested; and he shall not be liable for costs, and may appeal without bond. Such suits may be tried at the return term, and shall take precedence of other suits.

"4200. In all suits against delinquent tax-payers, the assessor and tax collector shall be made parties; and if it shall appear that the failure of the tax-payer to pay his taxes was caused by any willful default or negligence of the assessor or tax collector, judgment shall be rendered against the defaulter or defaulters for the amount of compensation of the revenue agent."

Under section 4199, "neither the State, nor any county, municipality, or levee board shall be chargeable with any fees or expenses," and the full compensation of the revenue agent is fixed at "twenty per centum of all amounts collected and paid over by him."

It is evident that these provisions are very different from the special act of April 3, 1888 (chapter 28, Laws of Mississippi, 1888, page 49), referred to by this court in the case of The Yazoo and Mississippi Valley Railroad Company *vs.* Thomas, 132 U. S., 181. In that case there was a special act for back taxes on railroads alone, and it had no future application, but only applied to delinquent railroads which did not pay up within sixty days after its passage, and had no provision for suit by the revenue agent or any one else, but the tax collectors were required to collect by sale or distress. (See section 5, Laws 1888, page 51.) On the contrary, the laws just quoted are general, applying alike to individuals, corporations, and officers and all kinds of taxes, obligations, and defalcations, past, present, and future, and intended to be a part of the permanent general code of laws of the State, for this act of 1894 is an amendment and partial substitute for chapter 126 of the Annotated Code of 1892.

These provisions do not provide for any summary remedies by sale or distress by the revenue agent, but for a regular assessment on actual notice in writing and after all objections are heard and disposed of by a competent tribunal, with a right to certiorari under section 90 of said code, and the revenue agent cannot act summarily or seize or sell anything, but under section 2 of said act of 1894, *supra*, he must bring suit "in the proper court."

Hence this law can in no proper sense be held to be a subsequent law impairing the obligation of contracts, but only as a law providing a regular, orderly method to determine whether property is liable to taxation when that question is in dispute. It is nothing more than if the legislature had passed a law that wherever the liability of property to

taxation is disputed the revenue agent should bring a suit against the proper owner "*in the proper court*" to settle the question, and it is inconceivable how that could be held to be impairing, or having any tendency to impair, the contract by subsequent legislation.

And this court expresses grave doubts whether any Federal question can be raised under such general legislation. It says, speaking through Mr. Justice Brewer:

"The act of 1881 is one making general provision for putting upon the tax-roll all lands that have escaped taxation in prior years. Of the validity of a statute of that character, that is, one providing generally for subjecting to taxation lands that have improperly escaped taxation in prior years, there can be no serious doubt, so that the real contention is that the taxing officers applied this valid statute to lands which ought not to have been subjected to its operation by reason of a prior contract between the State and its grantee. Does this bring the case within the constitutional inhibition against a State's passing a law impairing the obligation of a contract?

Railroad Company *vs.* Rock, 4 Wall., 177.
St. Paul & C. Railway *vs.* Todd County, 142 U. S., 282.
Mobile & Ohio Railroad *vs.* Tennessee, 153 U. S., 486.
Central Land Company *vs.* Laidley, 159 U. S., 103.

"Assuming, but not deciding, that this law of 1881, enacted subsequently to the contract created by the acts of 1857 and 1862, as practically applied by the State officers to the taxation of these lands, presents the question of a violation of the constitutional inhibition, and the contention of the plaintiff is that it does, and that question was distinctly presented to the State court, and by it decided—we are of

opinion that the judgment of the court was correct, and that it must be affirmed."

Winona, &c., *vs.* Minnesota, 159 U. S., 529.

In that case there was another ground, that the act of 1881 was unconstitutional in failing to provide proper notice to the owners of the property sought to be assessed and taxed.

Ib., pp. 527, 528.

And, as the court put it, this presented the question, "Were the tax proceedings in violation of that clause of the fourteenth amendment which prohibits a State from depriving any person of property without due process of law"?

Ib., p. 528.

And the court took jurisdiction on this ground, and this is the ground argued in the opinion; and while the said act of 1881 does not provide for notice specifically, the court review all the statutes and hold that on a fair construction of this act, together with those *in pari materia*, provision is made for notice, and that it had also been so construed by the State court, and they affirm the judgment.

Ib., 533–539.

See also—

Pittsburg *vs.* Backus, 154 U. S., 425, 426.

In the case at bar the State supreme court have expressly said that the alleged delinquent is entitled to notice and to make defense.

Yazoo & M. V. R. R. Co. *vs.* Adams, 73 Miss., 662, 663.

But that is not material, as the statute itself expressly provides for notice, and the parties here had notice. No point is made on that and no such question is raised or before this court. We have argued the point that the repeal of or a decision that a confessedly repealable exemption is unconstitutional raises no Federal question, and we here and now insist, under the reasoning, *supra*, of Mr. Justice Brewer, that even if the repealability of the exemption was denied and was fairly in dispute, it cannot be made a Federal question under such general laws as those above quoted.

(A 3.)

There are two points in the bill by which it is sought to raise a Federal question. These are the long arguments about the action and acquiescence of the State officials and all departments of the State government. This would come under the ordinary doctrines of laches and estoppel *in pais*, neither of which apply to the State or raise any Federal question, and besides the decision of the State court is in accordance with the decisions of this court.

Pierce *vs.* Somerset Railway Co., 171 U. S., 641, 648.

United States *vs.* Kirkpatrick, 9 Wheat., 720.

Hansford *vs.* Davis, 163 U. S., 278.

Vicksburg, &c., *vs.* Dennis, 116 U. S., 665.

Yazoo, &c., *vs.* Thomas, 132 U. S., 185.

United States *vs.* Tanner, 147 U. S., 661.

State *vs.* Brewer, 64 Ala., 287.

Perry Co. *vs.* Selma, 65 Ala., 391.

Delaware, &c., *vs.* Commonwealth, 50 Pa. St., 399.

Hannibal *vs.* City of Kansas, 81 Mo., 285, and cases cited.

2 Thompson, Comm. on Law of Corp., § 2825.

(A 4.)

There is nothing in the contention that the charter gives a vested right to the State treasurer to collect the taxes to the exclusion of the revenue agent. This would be no reason for enjoining the assessment, and thus escaping the payment of the taxes altogether, either to the State treasurer or any one else. If the exemption is unconstitutional this provision falls with it, for it is claimed by the plaintiff itself that it is a necessary and material part of the eighth section of the charter under which they claim the exemption, and if this section was valid the State treasurer could not collect the taxes until the year 1902, twenty years after the date of the charter in 1882, and it has no application to the taxes before then nor to the municipal taxes at any time.

It was a mere method of collecting the taxes, and no one can have a vested right in the method of assessing or collecting its taxes by the State.

Dailey *vs.* Swope, 47 Miss., 389, 390.
Winona, &c., *vs.* Minnesota, 159 U. S., 538.
St. Joseph *vs.* Steele, 167 U. S., 662.
L. & N. R. R. Co. *vs.* Louisville, 166 U. S., 714.

But the conclusive answer to such a contention, whether the contention itself is well founded or not, is that it is purely a legal defense, which can be set up to any suit brought by the revenue agent, and furnishes no ground whatever for equitable relief or of equity jurisdiction. Equity can have no jurisdiction to enjoin the revenue agent from bringing a suit on a ground which would be a full defense to the suit

when brought. The statute itself does not specify who shall collect the taxes. It says they shall be collected "by the proper officers."

Laws of 1894, pp. 30, 31, § 4.

Hence if the suit should be brought by the revenue agent, when the State treasurer was "the proper officer," that would be a perfect legal defense, and equity has no jurisdiction of such a case or such a supposition.

The question of who is the proper officer to bring a suit raises no Federal question.

Montgomery *vs.* Hernandez, 12 Wheat., 129.

Merritt *vs.* Bowdoin College, 169 U. S., 551, 556.

(A 5.)

Another remarkable reason for sustaining this bill is the statement at the end of paragraph 25, Record, page 24, that if this assessment is permitted, then the exemption will be annulled by section 112 of the constitution of November 1, 1890, which provides that if any assessment is made the counties shall not be denied the right to levy taxes on it. They admit that the exemption is repealable and yet ask this court to not let it be repealed by the constitution of the State. For said section 112 see Annotated Code of 1892, pages 59, 60.

And as to the towns, section 606 of the Revised Code of 1880 provides that they may tax railroads, and this is preserved in section 607 and re-enacted in the laws of 1884, section 1, pages 29, 30.

And as the State supreme court has expressly decided that all exemptions were repealed by the laws of 1884, 1886, 1890, and Code of 1892, there can be no pretence of a Federal question, it being expressly admitted that this exemption was repealable, and the only contention being that it never has been repealed. That all exemptions were repealed, see Opinions of November 22, 1898, and February, 1899, in case No. 244, pages 671, 672, and 686, 687.

FOURTH POINT.

(B 1.)

That it is a Suit against the State.

The statute provides that "all suits by the State revenue agent shall be in his own name for the use of the State, county, municipality, or levee board interested, and he shall not be liable for costs and may appeal without bond."

Annotated Code of 1892, § 4194.

"He shall have a right of action and may sue at law or in equity in all cases where the State, or any county, municipality or levee board has the right of action or may sue."

Laws of 1894, p. 29, § 2.

In a similar case, this court has held that an injunction was a suit against the State and could not be maintained, but was prohibited by the eleventh amendment to the Constitution of the United States, which provides that the "judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one

of the United States by citizens of another State, or by citizens or subjects of any foreign State," and that whether it was a suit against the State was to be determined by its object and scope and not by the nominal parties to the record. That was an injunction case very similar to this one in respect to the revenue agent.

In re Ayers, 123 U. S., 443.

The court say that if any Federal question should arise in the progress of the suit, it would ultimately reach this court on a writ of error, and any wrong could be corrected in that manner, but that a suit could not be enjoined on the assumption that the State court will decide erroneously.

Ib., pp. 494, 495.

"A bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must necessarily be a suit against the State. In such case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State."

Ib., pp. 502, 503.

And the distinction is clearly pointed out between this class of cases and that class where persons under color of State authority and performing ministerial duties seek to disturb others in the possession of their property.

Ib., pp. 504–507.

And this case is affirmed in—

Hans *vs.* Louisiana, 134 U. S., 10.

And again in—

In re Tyler, 149 U. S., 165, 166, 190, 191.

And again as late as—

Tindall *vs.* Wesley, 167 U. S., 219, 220.

Where it is said the test is whether the State would be bound by the judgment, as it clearly would be here.

Ib., 223, 224.

And, on general principles, equity will not enjoin a tax collector from bringing suit.

Archer *vs.* Terre Haute, &c., 102 Ill., 493.

So that if the State revenue agent was an improper party to the suit and could not be enjoined, and the plaintiff failed to ask for leave to amend and dismiss as to him, it was right and proper to dismiss the bill. The court will not undertake to carry on a suit with and against improper parties.

(3d ed.) 2 High on Inj., § 1613, citing—

Hudson *vs.* Maddison, 12 Sim., 416.

Jones *vs.* Garcia, &c., Turn. & R., 297.

This case of *In re* Ayers is also approved and applied by this court in—

Fitts *vs.* McGhee, 172 U. S., 524–528.

Harkrader *vs.* Wadley, 172 U. S., 169, 170.

(B 2.)

The same reasoning applies to the railroad commission.

But there is also another ground which applies to them. It is the second ground of the motion, that they act *judicially* and cannot be enjoined.

Section 720 of the Revised Statutes prohibits an injunction against proceedings in a State court.

The proceedings before the railroad commission are *judicial proceedings*, on notice, and with an opportunity to be heard, to determine whether the property is liable to taxation and whether it has escaped taxation.

It is expressly decided that they cannot be enjoined in the State court on a statute much broader than the common-law doctrine against injunctions in tax matters.

Y. & M. V. R. R. Co. *vs.* Adams, 73 Miss., 662, 663.

And in a later decision still it is decided that the railroad commission act judicially, and that if they commit any error it can be corrected by a certiorari to the circuit court under section 90 of the Annotated Code of 1892, and only in that way.

Y. & M. V. R. R. Co. *vs.* Adams, No. 9358, decided March 27, 1899, 76 Miss.

And this court has decided that the supreme court of a State has a right to construe its own laws, and where it decides that a party improperly assessed for taxes has a remedy by certiorari, and that this is his exclusive remedy, it raises no Federal question.

Yesley *vs.* Washington, 146 U. S., 646, 657.

N. Pac. R. R. Co. *vs.* Patterson, 154 U. S., 132–134.

That the railroad commission, in this class of cases, exercise the functions of a court and act judicially, see also—

Louisville Water Co. *vs.* C ark, 94 Ky., 47.
Cooley on Taxation, p. 749, n.
Youngston *vs.* Bradley, 64 Fed. R., 441.
New Orleans *vs.* Paine, 147 U. S., 261.
And other cases cited in the opinion in said case No. 9358.
Stanley *vs.* Supervisors, 121 U. S., 535, 550.
Williams *vs.* Supervisors, 122 U. S., 154.
Palmer *vs.* McMahon, 135 U. S., 665.
Boston *vs.* Park, 19 Am. Dec., 332.
State *vs.* Springer, 134 Mo., 212.
Railway Co. *vs.* Backus, 133 Ind., 513.
Throop on Public Officers, § 541 and cases.

Hence we ask that this appeal be dismissed or that the decree of the court below be affirmed.

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Attorney for Motions.